

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

GREAT NORTHERN RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that the Carrier violated the Clerks' Agreement.

1. When on March 1, 1945 it required Kenneth J. Gofney, Mark Jonovich, LeRoy A. Cronkite, Joe O'Leary, Russell M. Henry, Wilbur R. Leisy, Frank C. Ginger, Burdeen C. Jurdahl, Glenn E. Hellem, Walter J. Clark, Elvin Watson, Robert A. Joss, John Karina, Emmett E. Hogue, Clarence Roedell Jr., Edward C. Radwill, Dale G. Murphy, Dennis Maloney, Monte C. Hill, Frank Martinson, Calvin Prichard, Carl E. Snyder, Kenneth Ostic, Adrian Peters, Garland E. James, Chris F. Wohlers, Percy R. Adlam, Z. E. Morgan, Ray Blakeslee, J. D. Fanning, W. S. Kuehn, Thos. J. Tilton, Emery J. Laurence, Leon Amon, C. A. Franciscovich, Robert C. Waddle, Robert R. Kennicott, R. M. Goudy, and C. Bielefeldt, to perform services before 6:00 A. M. in the Mail and Baggage Department at King Street Station, Seattle, Washington. The regular permitted starting time of any position as outlined by the Agreement between the Carrier and the Employees in Rule 35 (a), reading: "... Where other than three consecutive shifts are worked, no shift shall have a starting time between twelve o'clock midnight and six A. M. ..."

2. That the employees named above, all employees adversely affected by reason of this violation of the Agreement, be compensated for one hour at the time and one-half rate of pay for March 1, 1945 and each and every day thereafter up to and including November 18, 1947 (at which time the violation was discontinued).

EMPLOYEES' STATEMENT OF FACTS: On December 1, 1944 the Carrier and the Employees signed an Agreement governing hours of service and working conditions of employees in service and represented by the Employees' Organization. A considerable number of the rules in the old Agreement which was in effect prior to the signing of this new Agreement, were changed or modified in certain respects. The Agreement was signed as effective December 1, 1944, but it was realized by the Carrier and the Employees after this schedule was agreed to, that delays in printing might result in considerable delay in its being placed in the hands of the employees affected, and those responsible for its enforcement. An agreement was reached between the Carrier and the representative of the Employees' Organization that no monetary claims would be advanced based on any provision of this new Agreement before 30 days following date of its distribution,

(4) The proper disposition of the claim for the period seven days prior to October 9, 1947 up to and including November 18, 1947 is payment at time and one-half rate instead of at pro rata rate for work performed prior to 6:00 A. M.

OPINION OF BOARD: Claimants are employed in the mail and baggage department of the Carrier at its King Street Station in Seattle, Washington. Two of them were assigned to commence work at 4:45 A. M. and the remainder at 5:00 A. M. This starting time was fixed to permit the handling of mail and baggage from Train No. 27 which arrived in Seattle at 5:00 A. M. On December 1, 1944, a new agreement was negotiated which contained the following language pertinent to the present case:

"Where other than three consecutive shifts are worked, no shift shall have a starting time between twelve o'clock midnight and six A. M., unless mutually agreed between the Management and the duly accredited representatives of the employees."

Rule 35, Current Agreement.

Previous to the adoption of the foregoing rule, no restraints were imposed by agreement as to starting time where less than three consecutive shifts were working. In other words, the starting time of these claimants was dealt with for the first time in the agreement effective December 1, 1944.

The evidence shows that after the agreement of December 1, 1944 was negotiated and before it was placed in effect, the local chairman of the Organization and representatives of the Carrier met and discussed the rule changes made, including the starting time rule involved in this claim. The evidence shows that the starting time of Claimants was not changed when the new agreement of December 1, 1944, became effective until complaint was made on October 9, 1947.

It is disclosed by the record that Claimants' starting time was 4:45 and 5:00 A. M., respectively, for many years prior to the agreement of December 1, 1944. For two years and two months after the negotiation of the new agreement, no objection was voiced to the continuance of the starting time of these Claimants as they had been for several years immediately prior to the negotiation of the agreement of December 1, 1944. When claim was made on October 9, 1947, based on the violation of the starting time rule, the Carrier took steps immediately to eliminate the violation which was accomplished on November 18, 1947. We have held many times, under such circumstances, recovery of retroactive pay could not be had for any period prior to the making of claim.

The mutual continuance of a practice after the negotiation of an agreement eliminating it, does not have the effect of changing the agreement. The provisions of the agreement supersede practices incompatible therewith. The acquiescence of the employees in the continuance of the practice after the contract became effective, has the effect of estopping the parties from the collection of retroactive penalties resulting therefrom. It does not estop either party from enforcing the contract and the collection of penalties accruing after demand for compliance has been made. See Awards 4281, 3979, 3503, 2137.

While delay alone will not prevent a consideration of a claim on its merits, yet where there has been no protest of the Carrier's acts and the delay has been such that the Carrier is justified in believing that the employees have acquiesced therein with knowledge of the violation claims for retroactive pay will be deemed to have been waived.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That carrier and employe involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this decision of the Adjustment Board has jurisdiction over the dispute involved herein; and

The agreement was violated as charged.

AWARD

Claim sustained from and following October 9, 1947.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 30th day of June, 1949.